Nos. 08-1553 and 08-1554

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In The Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD.
and K-LINE AMERICA, INC.,

Petitioners,

v.

REGAL-BELOIT CORPORATION, et al.,

Respondents.

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

v.

REGAL-BELOIT CORPORATION, et al.,

Respondents.

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF THE INTERNATIONAL GROUP OF PROTECTION AND INDEMNITY (P&I) CLUBS, ET AL., IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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INTEREST OF THE *AMICI CURIAE*[1]

American Steamship Owners Mutual Protection and Indemnity Association, Inc.; Assuranceforeningen Gard (Gjensidig); Gard P&I (Bermuda) Ltd.; Assuranceforeningen Skuld (Gjensidig); Skuld Mutual Protection and Indemnity Association (Bermuda) Ltd.; The Britannia Steam Ship Insurance Association Ltd.; The Japan Ship Owners' Mutual Protection & Indemnity Association; The London Steam-Ship Owners' Mutual Insurance Association Ltd.; The North of England Protecting and Indemnity Association Ltd.; The Shipowners' Mutual Protection and Indemnity Association (Luxembourg); The Standard Steamship Owners' Protection and Indemnity Association (Asia) Ltd.; The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Ltd.; The Standard Steamship Owners' Protection and Indemnity Association (Europe) Ltd.; The Standard Steamship Owners' Protection and Indemnity Association (London) Ltd.; The Steamship Mutual Underwriting Association Ltd.; The Steamship Mutual Underwriting Association (Bermuda) Ltd.; Sveriges Angfartygs Assurans Förening (Swedish Club); United Kingdom

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[1] No counsel for any party authored this brief in whole or in part, and no person other than the *amici curiae* represented in this brief made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court. The parties were notified ten days prior to the due date of this brief of the intention to file.

Mutual Steam Ship Assurance Association (Bermuda) Ltd.; United Kingdom Mutual Steam Ship Assurance Association (Europe) Ltd.; and The West of England Ship Owners' Mutual Insurance Association (Luxembourg) – together known as the International Group of Protection and Indemnity (P&I) Clubs[2] respectfully submit this brief as *amici curiae* in support of Petitioners.

Amici P&I Clubs comprise thirteen insurance associations known as "protection and indemnity clubs" (often abbreviated "P&I clubs"). P&I clubs are "associations of shipowners banded together to spread and absorb liabilities falling on their members." GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 76 (2d ed. 1975).[3] The individual P&I Clubs as *amici curiae* here form together a trade association known as the International Group of P&I Clubs.

The members of the Amici P&I Clubs are owners, operators, and charterers of ships of practically all maritime nations. The thirteen clubs represented here insure nearly ninety percent (90%) of the world's ocean-going ship tonnage. The P&I Clubs themselves

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[2] The *amici curiae* will be referred to hereinafter as "Amici P&I Clubs."

[3] For a discussion on the history and function of P&I clubs, *see* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 19-12 (4th ed. 2004), and Mark Tilley, *The Origin and Development of the Mutual Shipowners Protection & Indemnity Association*, 17 J. MAR. L. & COM. 261 (1986).

are non-profit mutual organizations. Their member shipowners insure one another on an indemnity basis against a variety of third-party liabilities relating to the use and operation of ships.

INTRODUCTION

This case raises an issue that affects virtually all the multimodal carriage of cargo in ocean containers between non-adjacent foreign countries and the United States. In 2008, U.S. ocean container ports handled 28.2 million TEUs,[4] nearly all of which were transported throughout the country by either rail or truck carriers. U.S. DEP'T OF TRANSP., BUREAU OF TRANSP. STATISTICS, AMERICA'S CONTAINER PORTS: FREIGHT HUBS THAT CONNECT OUR NATION TO GLOBAL MARKETS 3, 16 (2009). Uniformity and predictability of maritime law are essential not only to the Amici P&I Clubs, but also to world commerce. Insurance may be arranged for vessel interests more efficiently if the law that governs the carriage of cargo is uniform and predictable. The application of one law, the Carriage of Goods by Sea Act ("COGSA"), ch. 229, Pub. L. No. 74-521, 49 Stat. 1207 (1936) (re-printed in Note following 46 U.S.C. § 30701); Petition for Writ of Certiorari, Kawasaki Kisen Kaisha Ltd. and K-Line

[4] Because shipping containers are of various lengths, the TEU (twenty foot equivalent) was developed as the standard measure for counting containers. One 40 foot container equals 2 TEUs.

America, Inc., *petition for cert. filed* June 18, 2009, (hereinafter "K-Line Pet." or "Pet.") App. 48a-61a, throughout the entire door-to-door multimodal carriage of goods is extremely beneficial to all parties involved in multimodal carriage and the efficient operation of multimodal movements.

If, instead of COGSA, the Carmack Amendment to the Interstate Commerce Act[5] ("Carmack") were to apply to the U.S. inland part of multimodal carriage, the inland carriers or the contracting carriers would, according to the lower court opinion in this case, have to give the shipper a fair opportunity to demand full Carmack coverage, which is quite different than COGSA. Full Carmack rights would have to be offered as the primary regime to govern the inland carriage. Pet. App. 33a-35a. The Carmack carrier could only offer, as alternative terms, terms that are uniform with the terms of the multimodal contract of carriage evidenced by the ocean bill of lading.

Offering such a fair opportunity and the notice of the alternative bill of lading terms required by Carmack to the shipper would be very difficult if not impossible in practice. In multimodal carriage, the

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[5] The Carmack Amendment is codified at 49 U.S.C. §§ 10101 et seq. Part A governs rail transportation and begins at 49 U.S.C. § 10101. Part B governs Motor Carriers, Water Carriers, Brokers, and Freight Forwarders and begins at 49 U.S.C. § 13101. This brief shall refer to this legislation as the "Carmack Amendment" or as "Carmack." *See* K-Line Pet. App. 62a-91a.

inland carrier does not contract directly with the shipper. The shipper contracts with the contracting carrier, which may be a non-vessel operating common carrier (NVOCC) or a vessel operating common carrier (VOCC) or some other kind of contracting carrier. The contracting carrier might contract directly or indirectly with the U.S. inland carrier. The contracting carrier probably would not know which inland carrier would perform the U.S. inland carriage or the terms of that unknown carrier's contract at the time it contracted with the shipper. Without that knowledge, the contracting carrier could not give the shipper notice of the alternate terms a particular inland carrier wished to use.

Moreover, if more than one law were to govern various parts of each carriage, resolution of claims for loss or damage would be needlessly and wastefully complicated. Before the merits of a claim could be addressed, the applicable law (Carmack or COGSA) would have to be determined. The applicable law could not be ascertained until the location of the loss or damage and the location of its cause were determined.[6]

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[6] Moreover, if COGSA governed the ocean part of the carriage and Carmack governed the land part, the receiver would want to make a claim against both the ocean carrier and a land carrier, whose liability may be higher than the ocean carrier's. Carmack imposes a strict, insurer-type liability scheme on the carrier while COGSA employs a fault-based liability scheme. *See Sompo Japan Ins. Co. of America v. Union Pacific R.R. Co.*, 456 F.3d 54, 58 (2d Cir. 2006); *Rankin v. Allstate Ins.*

(Continued on following page)

The location of the loss or damage or the location of its cause may be difficult or impossible to prove. Ocean containers used for multimodal transportation are generally not opened during their carriage; as a result, damage or loss is often not discovered until the container reaches its final destination and is opened by its receiver. If different legal regimes required shippers to open and inspect containers as they were transferred from one mode or party to another, the transportation would be slowed and cargo might be damaged or pilfered. The ocean container has greatly reduced damage and loss during transportation.[7] This advantage should not be lost by a need to open containers in transit.

Co., 336 F.3d 8, 9 (1st Cir. 2003); *see also Missouri P. R. Co. v. Elmore and Stahl*, 377 U.S. 134, 137 (1964). If COGSA governed the entire carriage, the receiver could prove its prima facie case simply by proving delivery of a certain quantity of cargo to the carrier in good order and condition and delivery by the carrier in damaged condition, or that some cargo was missing when it was delivered to its receiver. The claim would be governed only by COGSA. There would be no reason for cargo interests to attempt to improve their chances of recovery by suing the inland carrier in addition to the contracting carrier.

[7] *See generally* MARC LEVINSON, THE BOX 1-4 (2006) (suggesting that the container shaped the world economy by reducing the time and costs of shipping); Henry A. Tombari, *Trends in Oceanborne Containerization and its Implications for the U.S. Liner Industry*, 10 J. MAR. L. & COM. 311, 311-12 (1979). ("Overall, the advantages of containerization over the breakbulk system are to reduce (i) the time and effort needed to handle cargo; (ii) possible theft and damage; (iii) time required to move from point of origin to final destination and (iv) a ship's turn around time in port.").

All of the foregoing weighs heavily in favor of applying a uniform law (COGSA) to the international, multimodal carriage of goods between a non-adjacent foreign country and a place in the United States. But the disuniformity under current law is even worse than having one legal regime covering the ocean leg, and another the inland leg, of a multimodal shipment. Because of an entrenched Circuit split, the law within the inland portion of the shipment changes as the container moves from circuit to circuit.

At the present time, the Fourth, Sixth, Seventh, and Eleventh Circuits do not apply the Carmack Amendment to the inland leg of a multimodal shipment. K-Line Pet. 11, 13-15. Cargo moving through those circuits would honor the contractual extension of COGSA. By contrast, the Second and Ninth Circuits do apply Carmack to the inland leg of a multimodal shipment and thus do not honor a contractual extension of COGSA (unless Carmack's strict requirements are satisfied). K-Line Pet. 11, 15-16. The complications can be illustrated by hypothetical cargo moving under a through bill of lading that incorporated COGSA from Yokohama, Japan via Tacoma, Washington and road and rail transportation to Albany, New York. While being shipped from Yokohama to Tacoma, the cargo would be governed by COGSA. After the cargo arrives in Tacoma and begins to move in the Ninth Circuit, it would be governed by Carmack. As cargo moved through Illinois and Indiana in the Seventh Circuit, it would be governed by COGSA. It would be governed by COGSA as the

cargo traveled through Ohio in the Sixth Circuit, and by Carmack when it reached New York in the Second Circuit.

It is difficult to imagine a legal regime more anathema to the uniformity and predictability that is so important for insurance carriers and for international commerce. A decision by this Court is necessary to unify the law governing international multimodal carriage in all the Circuits of this country.

SUMMARY OF ARGUMENT

A review of Carmack and its various recodifications shows that Carmack simply does not govern the carriage of cargo between a non-adjacent foreign country and a place in the United States. Carmack does govern carriage between an adjacent foreign country, Mexico or Canada, and a place in the United States. A significant amount of goods are carried over land between the U.S. and Mexico or Canada.[8] Application of the Carmack Amendment to that solely land carriage, either by train or truck, provides a uniform law to that entire land carriage no matter where during the inland carriage loss or damage occurs. By contrast, applying Carmack to the

[8] Of the 25 million container entries into the U.S. in 2007, over 14 million entered the nation by truck and rail from Canada and Mexico. U.S. DEP'T OF TRANSP., BUREAU OF TRANSP. STATISTICS at 21.

inland leg of a multimodal shipment from a non-adjacent country creates disuniformity and unpredictability; it is not what Congress intended.

This Court emphasized in several places in the opinion of *Norfolk Southern Ry. Co. v. James N. Kirby Pty Ltd.*, 543 U.S. 14, 28 (2004) that uniformity of law is crucial to multimodal transportation. In addition, the United States through its Delegation to the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on Transport Law that drafted the Rotterdam Rules,[9] emphasized the need for one law to govern as far as possible each multimodal carriage. The decision below is in tension both with *Kirby* and the position of the United States.

ARGUMENT

I. THE CARMACK AMENDMENT DOES NOT GOVERN CARRIAGE BETWEEN A NON-ADJACENT FOREIGN COUNTRY AND A PLACE IN THE UNITED STATES.

The plain text of the Carmack Amendment before the 1978 recodification clearly applied only to

[9] U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Dec. 11, 2008 General Assembly Resolution 63/122, Annex, U.N. Doc. A/RES/63/122. After a signing ceremony in Rotterdam in September 2009, this Convention will be known as the "Rotterdam Rules."

carriage from a place in the United States to a place in an adjacent foreign country, not to a place in a non-adjacent foreign country.[10]

Consistent with the plain text of the statute, this Court made clear before the 1978 recodification that the Carmack Amendment did not apply to carriage (or a shipment) between a non-adjacent foreign country and the United States. Justice Brandeis emphasized in 1920 that the Interstate Commerce Act governed carriage of cargo with *adjacent* foreign countries:

> The contention is that § 1 of the Act [to Regulate Commerce, February 4, 1887, c.

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[10] Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or *from* any point in the United States *to* a point in an *adjacent* foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed . . .

49 U.S.C. § 20(11) (1976) (emphasis added). Pet. App. 98a.

> 104, 24 Stat. 379] does not apply to the transportation of passengers from a foreign country to a point in the United States. To this there are two answers. The first is that the transportation here in question is not that of a passenger but of property. The second is that the act does apply to the transportation of both passengers and property from an *adjacent* foreign country, such as Canada. Section 1 declares that the act applies to "any common carrier . . . engaged in the transportation of passengers or property . . . from any place in the United States to an adjacent foreign country."

Galveston, Harrisburg & San Antonio Ry. Co. v. Woodbury, 254 U.S. 357, 359 (1920) (emphasis in original) (citation omitted). This Court also explained this same application of the Carmack Amendment to the Interstate Commerce Act, in *dicta*, in *Reider v. Thompson*, 339 U.S. 113 (1950). In *Reider*, a shipment of wool and skins was carried from Buenos Aires, Argentina to New Orleans, Louisiana, by ship pursuant to a bill of lading that described the carriage from Buenos Aires to New Orleans. At New Orleans, a separate bill of lading was issued by the railroad to evidence carriage from New Orleans to Boston. *Id.* at 116. This Court held that the carriage from New Orleans to Boston was governed by the Carmack Amendment. *Id.* at 117.

It was argued that the Carmack Amendment did not apply because the cargo originated in a non-adjacent foreign country. This Court responded as follows to that argument:

> Does the fact that the shipment in this case originated in a foreign country take it without the Carmack Amendment? We think not. There was no through bill of lading from Buenos Aires to Boston. The record does not show the slightest privity between respondent and the ocean carrier. The contract for ocean transportation terminated at New Orleans. Having terminated, nothing of it remained for the new, separate, and distinct domestic contract of carriage to "supplement." Even the parties to the ocean bill of lading and the domestic bill of lading were different. If the various parties dealing with this shipment separated the carriage into distinct portions by their contracts, it is not for courts judicially to meld the portions into something they are not. The test is not where the shipment originated, but where the obligation of the carrier as receiving carrier originated.

Id. See also K-Line Pet. at 19 nn. 3-5 (citing additional support).

Reider v. Thompson left us with the clear and rational rule that the Carmack Amendment's jurisdiction was limited to carriage from one state or territory of the United States to another (New Orleans, Louisiana to Boston, Massachusetts), or between an adjacent foreign country and a place in the United States. Its scope simply did not extend to cover carriage of cargo from a non-adjacent foreign country to the United States. If the parties had treated the carriage from Buenos Aires to Boston as

one move and evidenced that one move with one bill of lading, issued perhaps by an ocean carrier that had subcontracted the New Orleans to Boston leg to a railroad, no part of that one move would have been within Carmack's jurisdiction. The move would have been between Buenos Aires, a place in a non-adjacent foreign country, and Boston, a place in the United States.

When Congress recodified Carmack in 1978, it deleted 49 U.S.C. § 20(11), which had clearly limited the liability imposed by Carmack to carriage with adjacent countries.

The removal of the word "adjacent" from its prominent place in 49 U.S.C. § 20(11) has been misconstrued by some courts as affecting a substantive change in the law,[11] even though the introduction to the recodification act reads as follows:

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[11] The following relatively recent cases have applied the Carmack Amendment to multimodal carriage from or to non-adjacent foreign countries: *Mitsui Sumitomo Ins. Co. Ltd. v. Evergreen Marine Corp.*, No. 07 CV 3784 (CM), 2008 WL 4369763 (S.D.N.Y. Sept. 22, 2008); *Sompo Japan Ins. Co. v. Union Pacific R.R. Co.*, No. 03 CV 1604 (CM), 2007 WL 2230091 (S.D.N.Y. Aug. 2, 2007); *Sompo Japan Ins. Co. v. Yang Ming Marine Transp. Corp.*, No. 07 CV 11276 (DC), 2008 WL 4330058 (S.D.N.Y. Sept. 24, 2008); *Sompo Japan Ins. Co. of America v. Norfolk Southern Ry. Co.*, 540 F. Supp. 2d 486, *motion for reconsideration denied*, 553 F. Supp. 2d 348 (S.D.N.Y. 2008); *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.*, No. 06 CV 5549 (LAK), 2007 WL 541958 (S.D.N.Y. Feb. 14, 2007). Application of the introduction to the 1978 recodification, K-Line Pet. App. 90a, would probably have eliminated the need to litigate many of these cases or would at least have eliminated the need to litigate whether Carmack applied.

An Act

> To revise, codify, and enact *without substantive change* the Interstate Commerce Act and related laws as subtitle IV of title 49, United States Code, "Transportation"
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled* That certain general and permanent laws of the United States, related to transportation, are revised, codified, and enacted as title 49, United States Code, "Transportation" as follows: . . .

Pub. L. No. 95-473, 92 Stat. 1337 (1978) (first emphasis added); Pet. App. 90a. *See also* H.R. Rep. No. 95-1395, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3009, 3018 (stating that the statute is intended to remain substantively unchanged and courts should not infer that a change of language is intended to change substance). This introduction is supported by Professor Michael F. Sturley's explanation of the intent of recodification:

> The purpose [of recodification] is to restate existing law to conform to "the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections both of substance and of form." 2 U.S.C. § 285(b)(1).

Michael F. Sturley, *Reflections on the Recodification of Title 46*, 2 BENEDICT'S MARITIME BULLETIN 209, 212

(2004).[12] Even though it is clear that Congress did not intend to change the substance of the Carmack Amendment, some courts have reasoned that because the word "adjacent" was not as prominent after the recodification as it had been in 49 U.S.C. § 20(11), Congress intended to and did greatly expand Carmack's application. It is obvious that if Congress had wished to change the substance in this drastic manner, it would not have said that it did not.[13]

---

[12] Professor Sturley has also argued that there is no reason to distinguish *adjacent* foreign countries from non-adjacent foreign countries even though the distinction creates a substantive change, because "it seems wiser to follow the clear text of the statute rather than trace the prior language back over three decades and through two recodifications." Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J. MAR. L. & COM. 1, 34 (2009). On the contrary, it is widely accepted that when interpreting a recodification it should be presumed that the law is intended to remain substantively unchanged. *See Atchison, Topeka and Santa Fe Railway Co. v. U.S.*, 617 F.2d 485, 491 (7th Cir. 1980) ("Congress has unequivocally forbidden any interpretation that would substantively change the [Interstate Commerce Act]"); *U.S. v. Booky*, 733 F.2d 1335, 1337 n. 3 (9th Cir. 1984) (finding language present in original section of code, but absent in recodified section, must be read into recodified section when absence of language creates a substantive change); *Trailer Marine Transport Corp. v. Federal Maritime Comm.*, 602 F.2d 379, 383 n. 18 (D.C. Cir. 1979) (finding prohibition against substantive change in recodification of Interstate Commerce Act requires courts to closely examine language of the Act prior to recodification to determine intent of Congress).

[13] Indeed, even when Congress is silent as to its intent in revising and consolidating a statute, "it will not be inferred that Congress, in revising and consolidating the laws, intended to

(Continued on following page)

II. THE PRACTICAL RESULT OF THE DECISION OF THE LOWER COURT IN THIS MATTER IS OPPOSITE TO THE RESULT ACHIEVED BY THIS COURT IN *NORFOLK SOUTHERN RY. CO. V. JAMES N. KIRBY PTY LTD.*

This Court explained the advantages of uniform law governing multimodal carriage in *Norfolk Southern Ry. Co. v. James N. Kirby Pty Ltd.*, 543 U.S. 14 (2004).

Kirby presented multimodal carriage that was slightly more complicated than the carriage in this case. In *Kirby*, the shipper of cargo (Kirby) contracted with a Non-Vessel Operating Common Carrier (NVOCC) to carry cargo from Sydney, Australia to Huntsville, Alabama. The NVOCC contracted with a Vessel Operating Common Carrier (VOCC) also to carry the cargo from Sydney to Huntsville, Alabama. The VOCC contracted with a railroad (Norfolk Southern) to carry the cargo over land from the U.S. port of entry, Savannah, Georgia, to Huntsville, Alabama. The contract for the entire shipment was evidenced by the NVOCC through bill of lading issued to Kirby, and by the VOCC through bill of

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change their effect unless such intention is clearly expressed." *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 227 (1957) (quoting *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 (1911)); *see also Sompo Japan Ins. Co. of America v. Union Pacific R.R. Co.*, 456 F.3d 54, 64 (2d Cir. 2006) (quoting *Fourco*); *In re Roll Form Prods., Inc.*, 662 F.2d 150, 153 & n. 5 (2d Cir. 1981).

lading issued by the VOCC to the NVOCC. *Kirby*, 543 U.S. at 19.

This Court held that the bill of lading was a maritime contract, and therefore, was governed by federal law. The Court stated:

> Confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning. As we said in *Kossick*, when "a [maritime] contract . . . may well have been made anywhere in the world," it "should be judged by one law wherever it was made." Here, that one law is federal.

Id. at 29 (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 741 (1960)). This Court explained that the defenses and limitations in the NVOCC bill of lading protected all the parties that helped perform the multimodal carriage, including the railroad. The limitation contained in the VOCC bill of lading was lower than the NVOCC's bill of lading limitation and there was no direct contract between Kirby and the VOCC. This Court held that the NVOCC had acted as Kirby's limited agent to bind Kirby to the limitation contained in the VOCC's bill of lading. The lower limit was extended to the railroad by the Himalaya Clause[14] in the VOCC's bill of lading.

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[14] The term "Himalaya Clause" derives its name from the *S/S Himalaya*, which was involved in *Adler v. Dickson*, [1955] 1 Q.B. (C.A. 1954), and is used to describe provisions that extend maritime liability limitations. *See, e.g., Kirby*, 543 U.S. at 20 n. 2 (1960).

The case at bar is simpler and no limited agency theory is necessary. The cargo shipper, Regal-Beloit Corporation, et al. contracted with Kawasaki Kisen Kaisha, Ltd. (K-Line) to carry cargo from China to various inland destinations in the United States. K-Line's U.S. agent, K-Line America, contracted with the Union Pacific Railroad Company (UPRR) for the inland carriage. K-Line Pet. App. at 9.

Kirby's reasoning applies a fortiori here: It suggests that K-Line's Himalaya Clause extended the terms of K-Line's contract, including a choice of forum clause, to the railroad. K-Line would of course be entitled to that choice of forum clause as well. *See Vimar Seguros Y Reasequros, S.A. v. M.V. Sky Reefer*, 515 U.S. 528, 541 (1995) (holding that foreign arbitration clauses in a bill of lading are valid under COGSA).

III. THE RESULT BELOW IS IN TENSION WITH THE WELL-REASONED POSITION OF THE UNITED STATES IN RECENT TREATY NEGOTIATIONS FOR THE ROTTERDAM RULES, WHICH IS THAT ONLY ONE LAW SHOULD GOVERN ALL ASPECTS OF INTERNATIONAL, MULTI-MODAL, DOOR-TO-DOOR CARRIAGE OF GOODS.

The United States played an active role in negotiating a Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which was recently completed by the United

Nations Commission on International Trade Law (UNCITRAL) and approved on December 11, 2008 by the United Nations General Assembly.[15]

The United States proposed to the treaty drafters that the law governing the door-to-door carriage of goods should be as uniform as possible.[16] The United States stated its position as follows:

> I. Scope of application and performing parties . . .
>
> > 5. As part of the overall package, the United States supports a door-to-door regime on a uniform liability basis as between the contracting parties, subject to a limited network exception. This means that the contracting carrier's liability to the cargo interests would always be resolved under the Instrument's own substantive liability provisions (including the Instrument's own limitation and exoneration provisions) except when the network principle applies to supersede these provisions.

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[15] U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Dec. 11, 2008 General Assembly Resolution 63/122, Annex, U.N. Doc. A/RES/63/122. After a signing ceremony in Rotterdam in September 2009, this Convention will be known as the "Rotterdam Rules."

[16] UNCITRAL, 12th Sess., Working Group III at 3, A/CN. 9/WG. III/WP 34 (Aug. 7, 2003) *available at* http://daccessdds.un.org/doc/UNDOC/LTD/V03/869/05/PDF/V0386905.pdf?OpenElement.

> To provide the maximum degree of uniformity possible, we would keep the network exception as narrow as possible. The narrow network exception contained in article 4.2.1 of the Draft Instrument would be acceptable to the United States.[17]

The network exception referred to a desire by European Nations to have their road and rail conventions[18] govern damage or loss on European roads or rails.

While the U.N. Convention will govern a multimodal carrier's liability during U.S. inland carriage, it will not apply directly to the railroad or trucking company acting as subcontractor to the carrier. The United States indicated that the carrier's Himalaya Clause should preserve uniformity by applying the carrier's defenses to the railroad or motor carrier:

> With regard to other performing parties, the Instrument should not create new causes of action or preempt existing causes of action. For example, the liability of an inland carrier (e.g., a trucker or a railroad) should be based

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[17] *Id.*

[18] *See* Convention on the Contract for the International Carriage of Goods By Road (CMR), May 19, 1956, 399 U.N.T.S. 189; Appendix B to the Convention Concerning International Carriage by Rail (COTIF) of May 9, 1980, and Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM), 2 International Transport Treaties, V-213 (Wolters Kluwer, Supp. 1-10 Jan. 1986).

> on existing law. In some countries, this may be a regional unimodal convention. . . . In others, it may be a mandatory or nonmandatory domestic law governing inland carriage, or the generally applicable tort law. In some countries, cargo interests may not have a cause of action against inland performing parties. Preserving the status quo in this regard would, of course, preserve whatever rights an inland performing party may have under applicable national law to rely on a Himalaya clause to claim the benefit of the contracting carrier's rights under the Instrument. The Instrument should neither increase nor decrease these existing rights.[19]

Inland United States carriers should be able to rely on Himalaya Clauses in the bills of lading issued by multimodal carriers. To interpret Carmack contrary to the clear meaning and intent expressed by Congress in the 1978 Recodification bill would severely harm the uniformity sought by the United States in the future Rotterdam Rules, and would increase the expense of U.S. foreign trade. It is obviously far more efficient to govern multimodal carriage with one law rather than many. When the law changes with the geographical location of the cargo or with the mode of transportation, liability is neither uniform nor predictable. This is detrimental not only to insurers, but to international trade.

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[19] UNCITRAL, *supra*, note 16.

A decision of this Court is necessary to interpret the Carmack Amendment correctly and thus preserve uniformity in the law governing the multimodal carriage of cargo.

CONCLUSION

The petition for writ of certiorari should be granted.

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